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No. 90-1581

Supreme Court, U.S.
FILED
JUL 25 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR S. LANGENDERFER, INC., *et al.*,
Petitioners,

v.

S.E. JOHNSON COMPANY, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S.E. Johnson Company and the other respondents (collectively "Johnson")[1] submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners Arthur S. Langenderfer, Inc. ("Langenderfer"), Northern Ohio Asphalt Paving Co. ("NOAP"), MacRitchie Materials, Inc. ("MacRitchie Materials"), M&B Asphalt Co. ("M&B") and G.M. Sader Excavating & Paving Co. ("Sader").

STATEMENT OF THE CASE

Johnson and Langenderfer competed for state highway paving projects. Contracts were awarded by the state to the lowest qualified bidder. The volume of

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[1] Respondents have no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 29.1.

paving work fell in the early 1970s and, as a consequence, prices and profit margins shrank (JA at 932-33, 4524-26).[2] Johnson operated at a profit; Langenderfer, which bid below its costs, did not (JA at 937-39). Langenderfer went out of business in 1978 and blamed Johnson for its demise.

This litigation began only after Johnson rejected Langenderfer's invitation to "raise bid prices" and to "stabilize the market" (JA at 1006-08).

Langenderfer and NOAP[3] sued in 1976. Following the first trial, the Sixth Circuit rejected plaintiffs' complaints about Johnson's above-cost bids as a matter of law, stating: "It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984)("*Langenderfer I*"), *cited with approval in Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986).

M&B, Sader and Langenderfer's affiliate MacRitchie Materials joined the original plaintiffs in a second lawsuit. The two cases, which contained essentially the same allegations, were consolidated for trial.

At the second trial, plaintiffs renewed their complaints about Johnson's low bids. Plaintiffs also al-

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[2] Citations to "JA" are to the Joint Appendix in the Court of Appeals. Citations to "App." are to the Appendix filed with the Petition in Case No. 90-1581.

[3] NOAP is a sister company of Langenderfer. It purchased stone and sand and used it to mix asphaltic concrete.

leged that Johnson monopolized the production and supply of limestone approved for state paving contracts. Proof of these allegations was essential because, without proof of monopoly in limestone, claims of monopolistic stone pricing, price squeezing and tying could not stand. In short, without proof of a limestone monopoly, plaintiffs' case was nothing more than legally insufficient competitor complaints about low bids.

Prior to trial, Johnson moved *in limine* to exclude evidence, *inter alia*, of losses on jobs Langenderfer won and on jobs outside the relevant market (JA at 152-53, 162-63, 167). At the close of the evidence, Johnson renewed motions for directed verdict that it had made at the close of plaintiffs' case (*id.* at 2901, 3721). The jury returned a verdict for each plaintiff. Johnson timely moved for judgments notwithstanding the verdicts and for a new trial (*id.* at 283, 285-86). In these motions, and in its directed verdict motions, Johnson challenged, *inter alia*, (1) each party's right to recover absent monopoly power in raw material markets; (2) Langenderfer's reliance for proof of damages on profits from jobs outside the relevant market and on losses from jobs Langenderfer won; and (3) Sader's right to recover since it was not a participant in any relevant market (*id.* at 283, 285-86, 2902, 2904, 2908, 2911, 2926, 2927, 2930, 3721, 3836-37, 3851, 3853, 3886). The District Court denied these motions. The Sixth Circuit held, however, that the evidence could not support the jury finding of monopoly in limestone, or in any other raw material market. The Sixth Circuit upheld the judgment for Langenderfer, although for a reduced amount, and reversed the judgments for the other plaintiffs. In its

71-page opinion, the Sixth Circuit gave the plaintiffs the benefit of every reasonable inference that could be drawn from the evidence and scrupulously followed the appropriate standards of appellate review.

Johnson petitioned this Court for a writ of certiorari on April 22, 1991. That petition (Case No. 90-1623) seeks review of two significant questions under the antitrust laws:

1. Whether monopoly power may be found in a government contract bid market absent collusion where there are many competitors and entry has occurred;

2. Whether a monopolist's lawful, above-cost pricing gives rise to antitrust injury.

Langenderfer and the other plaintiffs filed the instant petition on April 12, 1991. Plaintiffs' petition is without merit. Plaintiffs point to no conflict among the circuits or with a decision of this Court, and they have not raised any true constitutional issue. The petition has six sections. This brief responds to each section.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT APPLIED THE APPROPRIATE STANDARD OF REVIEW

Plaintiffs assert that the Court of Appeals usurped the jury's function by weighing the evidence and substituting its own "vision of 'economic reality.' " They state also that the opinion below is "precedent, which if allowed to stand, will hereafter plague the course of innumerable appeals and judicial supervision of jury verdicts."

These assertions are wholly without merit. Nothing in the text of the appellate court's 71-page opinion departs from established principles of appellate review. Contrary to plaintiffs' assertions, the court was careful to apply the appropriate standard of review:

> Once the jury has acted, we set aside its verdict and the district court's refusal to grant a j.n.o.v. motion only if we are satisfied, upon a thorough review of the record, that error has been committed. We also give plaintiffs the benefit of reasonable and favorable inferences that may be drawn from the evidence. We may not pass upon credibility of witnesses in making this review. To the extent, of course, that the district court drew or made legal conclusions based on the jury's responses to interrogatories, we may review decisions of law *de novo*.

(App. A10). The court gave particular deference to the judgments for Langenderfer and NOAP because two juries had found in their favor. (*Id.*)

Even under such stringent standards, the Sixth Circuit held that plaintiffs failed to prove that Johnson either possessed or posed a dangerous probability of achieving monopoly power in the production or supply of the relevant raw materials (sand and limestone) in any geographic market. This holding rested on *plaintiffs'* market share evidence, *plaintiffs'* alleged relevant markets and submarkets, and *plaintiffs'* exhibits and testimony. That evidence established that none of the plaintiffs depended on Johnson for raw materials, all of the plaintiffs had their own or independent raw material sources, and Johnson's high-

est share of the market was 30% (App. A17, A21, A26, A30, A31-33, A42-44, A53). Plaintiffs do not point to any error in these conclusions.[4]

While plaintiffs say the court usurped the jury's fact-finding function, they point to no evidence that conflicts with the basis of the court's decision. In short, section I of the petition has nothing to do with the applicability of the summary judgment standards articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); rather, it is a direct challenge to the authority of courts of appeals to reverse jury verdicts due to insufficient evidence. It is well-settled, however, that the Seventh Amendment does not bar appellate review to determine whether the evidence is sufficient to submit to a jury. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321-22 (1967); *Galloway v. United States*, 319 U.S. 372, 389 (1943); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 661 (1935).

II. THE COURT PROPERLY CONSIDERED LANGENDERFER'S DAMAGES AND NOAP'S STANDING

A. Plaintiffs Have Shown No Infringement Of The Seventh Amendment In The Reversal Of NOAP's Judgment Or In The Modification Of Langenderfer's Damages

Plaintiffs' Seventh Amendment challenge is directed at two distinct holdings of the Court of Appeals. First, the Sixth Circuit held that NOAP's claim was invalid as a matter of law. Second, the

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[4] The court specifically rejected four alleged anticompetitive acts: monopolistic stone pricing, price squeeze, tying, and refusal to sell stone (App. A29, A37-38, A41, A53-54, A54 n.26). Again, petitioners point to no error in these conclusions, which rest, in part, on the failure of proof of monopoly power in stone.

court held that the damage award to Langenderfer was infected by reliance on improper evidence.

1. The Court Correctly Reversed The Judgment For NOAP

NOAP ignores the substance of the Court of Appeals' holding, and addresses the standing discussion out of context.

NOAP alleged it was in the business of purchasing sand and stone and selling asphaltic concrete to Langenderfer and others. As an asphalt producer, the only claims asserted by NOAP that could have given rise to direct, antitrust injury—monopolistic stone pricing and tying—were specifically rejected by the court because there was no evidence of monopoly power in raw material markets. The court concluded that NOAP "has established no antitrust injury by reason of defendants' stone and sand activities and mergers during any relevant period" (App. A46). That ought to have brought NOAP's claim to an end.

The court went further, however, out of deference to the jury, to consider whether it might sustain the verdict for NOAP on some other ground. The court thus considered whether NOAP was entitled to damages because its principal customer, Langenderfer, was allegedly driven from the market by Johnson: "May NOAP nevertheless recover for indirect damages, apart from the sand and stone aspects of this controversy, by reason of the anticompetitive conduct of defendants, as paving contractors, directed toward and harming Langenderfer?" (App. A47) After full consideration of this possible claim, the court rejected it, holding that NOAP would lack antitrust standing to assert it.

2. Langenderfer Has Shown No Error In The Modification Of The Damage Award

Langenderfer does not dispute the accuracy of the court's modification of damages.[5] The court modified the damages for two reasons. First, the "calculation includes damages for *both* Langenderfer and NOAP" (App. A61). Once the court concluded that the award for NOAP could not stand, it was duty-bound to adjust the award. Even Langenderfer does not contend that it is entitled to damages attributable to NOAP if the decision to reverse NOAP's judgment is correct.

Second, the court determined that the damages awarded Langenderfer alone were not supportable on the record. The court found the award legally infirm because, *inter alia*, the base period measure of damages included profits from work unrelated to state paving contracts (and therefore outside the relevant market), and the damage claim included job losses where Langenderfer had bid below its own costs (App. A64, A65).

3. Plaintiffs' Seventh Amendment Rights Were Not Affected

It is in the foregoing context that plaintiffs contend that the court's modification of Langenderfer's dam-

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[5] If anything, the panel was overly generous in its award. Langenderfer's own evidence established a 1.32% profit margin on state work between 1968-70. Between 1973 and 1977 Langenderfer won state contracts worth $4.7 million (JA at 4278 (Px. 71)). Thus, even assuming Langenderfer's profit margin on its state work remained constant after 1970 and through 1973-77 (an assumption the panel rejects as unfounded), Langenderfer's "damages" would have been $62,040 (1.32% of $4.7 million), not the $191,454 awarded by the panel.

age award and consideration of NOAP's standing infringed their rights under the Seventh Amendment.

NOAP complains that the lack of antitrust standing should not be a bar because NOAP's standing was not raised below. NOAP points to no error in the determination that it lacked standing to recover for injury occasioned by its status as supplier to Langenderfer or to any fact on which the evidence was in conflict. NOAP complains that "[t]he common law proscription referred to in the Seventh Amendment limits appellate review to issues properly raised below or on appeal." Petition at 19. NOAP cites no authority for this interpretation of the Seventh Amendment.

Antitrust standing is a question of law, and is not a question for the jury. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983). Accordingly, no Seventh Amendment issue is presented even if, as NOAP contends, the appellate court, *sua sponte* noticed the error.

NOAP argues that an appellate court errs if it ever considers issues not raised below. This argument is contrary to settled law:

> The matter of what questions may be taken up and resolved for the first time on appeal is left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any

> doubt, see *Turner v. City of Memphis*, 369 U.S. 350, 82 S. Ct. 805, 7 L.Ed.2d 762 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S., at 557, 61 S. Ct. at 721.

Singleton v. Wulff, 428 U.S. 106, 121 (1976). "These examples are not intended to be exclusive." *Id.* at 121 n.8.

NOAP also says that the Sixth Circuit violated its Seventh Amendment rights because NOAP's standing to claim indirect injury was not briefed to the appellate court. This issue, too, is long-settled by Supreme Court precedent:

> If the refusal to grant the motion for a new trial was deemed by the Circuit Court of Appeals plain reversible error, it was at liberty under its rules to notice the error although not assigned and the omission from the record of the grounds of the motion would be no obstacle to a review, since the motion was obviously directed to the failure to award substantial damages.

Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 480-81 (1933). Here, Johnson appealed the denials of its motions for a directed verdict, judgment notwithstanding the verdict, and a new trial. Those motions and the appeal challenged NOAP's right to recover absent monopoly power in raw material markets.

Moreover, the standing issue was fully briefed and argued with respect to NOAP's sister company, MacRitchie Materials. The Sixth Circuit's recent decision in *Pinney Dock and Transport Co. v. Penn*

Central Corp., 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), is on point. There, antitrust standing had not been raised below as to one plaintiff, but had been as to another. 838 F.2d at 1461. The two plaintiffs occupied the same position in relation to the relevant market as do MacRitchie Materials and NOAP here. *Id.* at 1449. The court in *Pinney Dock* found the antitrust standing arguments presented "with sufficient clarity and completeness" to allow resolution as to the plaintiff against whom the issue had not been raised. *Id.* at 1461.

The reduction in Langenderfer's damages does not present a Seventh Amendment issue. In its motion for a new trial to the District Court, Johnson specifically challenged the propriety of including base period profits outside the relevant market as a measure of damages, and of awarding damages for losses on jobs Langenderfer won (JA at 285-86). The Court of Appeals relied on these grounds in modifying the damage award (App. A64-65).

Langenderfer characterizes the Court of Appeals' decision as a directed verdict. The verdict for Langenderfer, however, was affirmed. The modification of the verdict, therefore, could only have been based on a review of the order denying the new trial. Since Johnson's new trial motion in the District Court raised the issues addressed by the Court of Appeals, one procedural predicate (issues not raised below) of Langenderfer's petition is infirm.

This Court has three times considered, but not reached, the question whether a court of appeals may review a district court denial of a new trial motion based on an argument that the verdict is excessive. *Browning-Ferris Industries of Vermont, Inc. v. Kelco*

Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 2922 n.24 (1989); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955). Neither the opinion below nor Langenderfer's petition presents that question here.

Unlike the cases previously before the Supreme Court, which dealt with lower court discretion to determine the "excessiveness" of damage awards, the Sixth Circuit here was concerned with damages based on erroneous damage evidence. Here the jury was allowed to consider evidence of damages outside the relevant market and evidence of damages based on jobs Langenderfer bid below its own costs.

In its petition, Langenderfer cites two cases, *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389 (1937), and *Young v. Central Railroad Co.*, 232 U.S. 602 (1914), for the broad proposition that a "Court of Appeals cannot direct a verdict in a jury case in view of the Seventh Amendment prohibitions." Those cases addressed the interplay between motions for directed verdict and for judgment notwithstanding the verdict.[6] For example, *Kennedy* addressed the effect of a plaintiff's

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[6] *Kennedy* and *Young* were decided before the addition of Rule 50(b) to the Federal Rules of Civil Procedure. Rule 50(b) limits, if it does not undermine, the continued viability of these cases. These cases arose under the Conformity Act and concerned the procedural pitfalls from a trial court's not reserving the issues raised in a motion for a directed verdict. The cases do not apply to the modification of Langenderfer's damages since that involved the court's power to order a new trial. As to the reversal of NOAP's judgment, to the extent these decisions have any continued viability as Seventh Amendment precedents, they would not apply here since Johnson moved for both a directed verdict and judgment notwithstanding the verdict.

failure to file a motion for judgment notwithstanding the verdict following a motion for a directed verdict. 301 U.S. at 394. *See Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 52 (1952). In short, these cases are inapposite to the modification of Langenderfer's damages.

Langenderfer has not asked this Court whether a court of appeals must order a new trial on damages once it finds that an award of damages is infirm. Courts often have ordered a new trial or permitted the plaintiff to elect a remittitur. *Phillips & Colby Constr. Co. v. Seymour*, 91 U.S. 646, 656 (1876); *Hansen v. Boyd*, 161 U.S. 397, 411-12 (1896); *Osborn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 919 (5th Cir. 1987). Where, however, the amount of damages is readily ascertainable, a court may determine damages under its power to grant summary judgment on that single remaining issue. *Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987), *cert. denied*, 485 U.S. 992 (1988); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352, 367 (6th Cir. 1978); *Feinsinger v. Bard*, 195 F.2d 45, 55 (7th Cir. 1952); 6A J. Moore, J. Lucas, G. Grotheer, *Moore's Federal Practice & Procedure* ¶¶ 59.06, 59.08[6], 59.08[7] (2d ed. 1985). *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)(summary judgment is addressed to "whether there is a need for a trial. . . .")[7]

A remand of Langenderfer's case for a new trial on damages could only have resulted in delay and a

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[7] Where the amount of damages cannot objectively be determined—for example, in tort cases involving pain and suffering—a Seventh Amendment question may arise. *Kennon v. Gilmer*, 131 U.S. 22, 26-31 (1889); *Carter v. District of Columbia*, 254 App. D.C. 71, 795 F.2d 116 (1986).

lower damage award because the court gave Langenderfer the benefit of every inference and presumption consistent with the law. The court specifically recognized this, stating it was modifying the damage award "to avoid delay in further remand and hearings . . ." (App. A68).

The only potential dispute here is whether this Court might reach a different conclusion regarding the maximum amount of damages. That issue is not a constitutional one and does not warrant review by this Court.

B. Plaintiffs' Due Process Contention Has No Merit.

Plaintiffs' due process claim is fundamentally flawed. The Federal Rules of Appellate Procedure authorized plaintiffs to petition for rehearing by stating "with particularity the points of law or fact which in the opinion of petitioner the court has overlooked or misapprehended. . . ." Fed. R. App. P. 40(a). Similarly, the Sixth Circuit's Internal Operating Procedures specifically authorized plaintiffs to file a petition for rehearing to, *inter alia*, "bring to the attention of the panel claimed error of fact or law in the opinion." Sixth Circuit Internal Operating Procedure 20.2. Plaintiffs filed a petition for rehearing, but chose not to address the underlying merits of the Sixth Circuit's standing analysis or modification of damages. They were not deprived of due process since they were afforded an opportunity to be heard.

III. THE COURT OF APPEALS PROPERLY FOUND THE EVIDENCE INSUFFICIENT TO SUPPORT THE OTHER PLAINTIFFS' CLAIMS

The other plaintiffs contend that, since the *jury* found in their favor, the Seventh Amendment pre-

cludes the court from considering the sufficiency of the evidence. Plaintiffs' complaint is simply that, by testing the evidence rather than accepting the jury's findings at face value, the court violated the Seventh Amendment. As discussed in Section I, *supra*, the Seventh Amendment does not bar appellate review of the sufficency of the evidence to support the verdict. *Neely*, 386 U.S. at 321-22; *Galloway*, 319 U.S. at 389; *Baltimore & Carolina Line*, 295 U.S. at 658-61.[8] Each of the grounds on which the Court of Appeals relied was raised in the motions to the District Court and in briefs to the Court of Appeals.

In any event, plaintiffs have not identified any evidence that contradicts the Sixth Circuit's holdings regarding the geographic and product markets in which the plaintiffs compete. With regard to geographic markets, the court held that M&B was not an actual or potential competitor throughout the thirteen counties. The court also considered M&B's submarket claims, and held the evidence insufficient to support them (App. A12). M&B does not point to any factual error in these holdings.

The court considered Sader's claims, and found no evidence that Sader was ever a potential competitor for state paving contracts, or that it ever intended to compete beyond two specific counties (App. A19). The court considered Sader's submarket claim, and found a failure of proof (*id.* at A26). Sader's petition points to no errors of fact or law in these findings.

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[8] Plaintiffs' reliance on *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962), is misplaced. That case deals solely with a court's duty to construe ambiguities in special interrogatories so as to sustain, if possible, the jury's verdict. *Id.*

With regard to product markets, plaintiffs claimed at trial that Johnson abused monopoly power in the market for limestone or sand approved for use on state paving projects. The evidence showed that Johnson was not the largest producer of state-approved limestone and there were numerous sources of this material in northwestern Ohio.[9] Plaintiffs offered no market share evidence regarding sand, but identified numerous sources of natural and manufactured sand and admitted that none of the parties depended on Johnson for sand.

The Court of Appeals held that this evidence was clearly insufficient to support a finding of monopoly power in these markets. Plaintiffs do not challenge the accuracy of the facts underlying these holdings.

Plaintiffs now contend that the product markets consist of the stone and sand actually used on particular state jobs. This contention makes no sense. If there is a raw material market, it must include "those products that have reasonable interchangeability for the purposes for which they are produced. . . ." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 404 (1956). In this case, that would include production of state-approved limestone, sand or asphalt that was available, whether or not used for state jobs. This is in fact the market definition presented by plaintiffs at trial, both in testimony and exhibits (JA 4128-38, 4162). It is also the market definition given to the jury.

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[9] Plaintiffs' own experts testified that they found monopoly power in the ODOT-approved limestone market only by combining Johnson's share of production with that of France Stone, the largest producer in the market. The court properly rejected that theory.

IV. THE COURT DID NOT USURP THE JURY'S FUNCTION REGARDING SADER'S CLAIM

The Court of Appeals held that Sader's claim was infirm for four reasons (App. A29). Principal among these was a failure to prove that Johnson monopolized any market in which Sader participated (*id.* at A27). Absent monopoly power or a purpose to obtain a monopoly, no jury issue regarding Johnson's alleged refusal to deal ever arose.

V. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION NOT TO AWARD ATTORNEYS FEES FOR THE UNSUCCESSFUL PROSECUTION OF LANGENDERFER I

Langenderfer seeks review of the affirmance of the District Court's denial of fees for the unsuccessful prosecution of *Langenderfer I*. The Court of Appeals properly reviewed the District Court's fee award for abuse of discretion and found none. *Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 2553 (1988). The District Court properly determined that Langenderfer could not recover attorneys' fees for work done on unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). Langenderfer points to no error of law or fact and identifies no conflict with any other court.

VI. THE DENIAL OF PREJUDGMENT INTEREST WAS PROPERLY AFFIRMED

Langenderfer also seeks review of the affirmance of the District Court's decision to deny interest on the vacated *Langenderfer I* judgment. In *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990), however, this Court held that post-judgment interest may not be calculated until the amount of damages is ascertained. 110 S. Ct. at 1576. Here, the

amount of damages was not ascertained at the time of the first judgment because it was vacated. *Id.*, *citing with approval, Federal Deposit Ins. Corp. v. Rocket Oil Co.*, 865 F.2d 1158 (10th Cir. 1989). The Sixth Circuit's decision is consistent with, and compelled by, this Court's decision in *Bonjorno.*[10]

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[10] Langenderfer's claimed circuit conflict is illusory. *Bailey v. Chattem*, 838 F.2d 149 (6th Cir.), *cert. denied*, 486 U.S. 1059 (1988), and *Handguards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985), were decided before *Bonjorno. H&J, Inc. v. Flygt Corp.*, 925 F.2d 257, 261-62 (8th Cir. 1991), awarded post-judgment interest from the date of a judgment that the court had *affirmed.*

CONCLUSION

For the reasons stated, Respondents request that this Court deny the Petition in Case No. 90-1581.

Respectfully submitted,

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